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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1959

No. [redacted] 925

H. J. WILSON,

Petitioner,

vs.

CHARLES HENRY BEVILLE, *et al.*,

Defendants;

THE CITY OF LOS ANGELES, a municipal corporation,

Defendant and Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of Calfornia, Second Appellate District, Division One.

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Defendant and Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, H. J. Wilson, respectfully prays for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division 1, in order to review its judgment affirming the judgment of the Superior Court of the State of California, in and for the County of Los Angeles, wherein a petition for hearing in the Supreme Court of the State of California was denied January 20, 1960, and which judgment awarded petitioner a sum of money for property

taken by the City of Los Angeles but did not award said sum based on the value of said land nor for the use and occupancy of said land, but rather on the amount of a lien that had existed on the land.

Opinion Below.

The opinion of the District Court of Appeal of the State of California is officially reported as *Wilson v. Beville,* 175 Advance California Appellate Reports (A. C. A.) 531, and is appended hereto on the part marked "Appendix".

Jurisdiction.

1. Jurisdiction of this court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

> "Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * *
>
> "(3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * *."

2. The following cases are believed to sustain the jurisdiction of this Court:

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U. S. 226;

Shelley v. Kraemer, 334 U. S. 1, 14, 68 S. Ct. 836, 92 L. Ed. 1161;

Terry v. Adams, 345 U. S. 461, 484.

3. The Supreme Court of the State of California is the highest Court of said State and it refused a hearing on this cause on January 20, 1960.

4. The judgment of which review is sought is a final judgment of the District Court of Appeal of the State of California, Second Appellate District, Division 1, filed and entered November 23, 1959.

5. The time to file the petition herein was extended by order of the Supreme Court of the United States on April 19, 1960, to May 9, 1960.

Questions Presented.

1. May an incorporated city exercising State jurisdiction take property owned by petitioner under the doctrine of inverse condemnation, and then fail to compensate petitioner for the property taken?

2. May a State Statute which defines the extent of interest in land acquired by a treasurer's deed from a City Treasurer therein be totally ignored when the question of extent of interest conveyed thereby arises?

3. May a State, by judicial construction, change the vested property rights of individuals in property acquired by a City of the State under the doctrine of inverse condemnation?

4. May a State, acting through its judiciary, deny an individual whose property has been taken for public use, the right to a jury trial on the issue of compensation?

Constitutional Provisions and Statutes Involved.

This appeal involves the following quoted section of the United States Constitution:

"AMENDMENT 14
(Adopted July 28, 1868)
Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment 14, United States Constitution.

In particular, this appeal involves the second sentence of Section 1 of the 14th Amendment to the United States Constitution.

The case also involves two State Statutes of the State of California, Streets and Highways Code Section 6555 and Section 6571. In particular, Section 6555 of the Streets and Highways Code of the State of California provides as follows:

"§6555. EVIDENTIARY EFFECT OF DEED: TITLE CONVEYED. The deed of the treasurer, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of

the period for redemption, free of all encumbrances, except the lien for State, county and municipal taxes."

Section 6571 of the Streets and Highways Code of the State of California provides as follows:

"§6571. LIMITATION OF CONTEST PROCEEDINGS Any action, suit or proceeding attacking or contesting the validity of any deed issued under the provisions of this division, or the validity of the proceedings subsquent to the issuance of the certificate of sale, must be brought within six months after the issuance of the deed, and if the validity of the deed or of the proceedings is not contested within that six months' period, it shall not be thereafter contested or questioned in any action, suit or proceeding."

Statement of the Case.

The petitioner herein, H. J. WILSON, is the grantee of real property acquired by his predecessor in interest, pursuant to a treasurer's deed from the Treasurer of the City of Los Angeles issued August 23, 1950.

Section 6555 of the Streets and Highways Code of the State of California, provides that the treasurer's deed conveys to the grantee the absolute title to the lands described in the deed.

Section 6571 of the Streets and Highways Code of the State of California, provides that if the treasurer's deed is not attacked by action, suit or proceeding within six months from date of issuance of the deed, the validity of the deed shall not thereafter be contested in any action, suit or proceeding.

Section 6571 of the Streets and Highways Code of the State of California, was construed in *Elbert, Ltd. v. Gross*, 41 Cal. 2d 322, to apply, whether the grantee of the treasurer's deed was plaintiff or defendant.

More than six months after issuance of the treasurer's deed to plaintiff's predecessor, plaintiff commenced an action to quiet title to the real property described in the deed against, among others, the City of Los Angeles, a Municipal Corporation of the State of California, which said City of Los Angeles was in possession of a portion of the petitioner's property, using same as a public street.

The City of Los Angeles, hereinafter referred to as "the City." filed an Answer, asserting, among other things:

1. That it had acquired an easement pursuant to a condemnation action concerning said property;

2. That it had acquired an easement by public user.

Thereafter, trial was had, and the trial court made findings, which among other things, included a finding that the lien of a street improvement bond that resulted in foreclosure and issuance of a treasurer's deed to petitioner's predecessor, attached on November 23, 1927; that the condemnation action filed by the City was filed November 25, 1927; that the holder of the lien of assessment bond was never made a party to the condemnation action; that the City had devoted the property to a public use since 1932 as a street, and from such findings the trial court concluded that the City had an easement by reason of the condemnation action, even though neither petitioner nor his predecessors were made parties to the condemnation action, and further, that the City had acquired an easement created by the public use of the street

and plaintiff was not entitled to damages from the City but was entitled to quiet his title subject to the easement over a portion of his property over which runs the street.

The petitioner appealed and the District Court of Appeal, Second Appellate District, held that the condemnation action of the City left the lien of the bond of petitioner's predecessor unimpaired, but that the City had acquired an easement by public use and since the petitioner did not file a claim with the City pursuant to its Charter, petitioner was not entitled to compensation.

Petitioner then filed a petition for hearing in the Supreme Court of the State of California and the cause was heard and determined. The decision in the Supreme Court of the State of California is reported in 47 Cal. 2d 852, as *Wilson v. Beville.*

The decision in the Supreme Court held that petitioner was not required to file a claim with the City; that the lien of petitioner's predecessor's bond was unimpaired by the condemnation action; that the City had an easement by reason of the public use; but that petitioner was entitled to be compensated for the part of his property thus taken by the City, under the doctrine of inverse condemnation. The cause was reversed to determine plaintiff's damages.

Thereafter, the cause was set for a judicial interpretation of *Wilson v. Beville,* 47 Cal. 2d 852, in the Superior Court, at which time the trial court determined as a matter of law, no evidence having been introduced nor permitted under the scope of the hearing, that petitioner was only entitled to be compensated for the amount of a predecessor's lien, even though such lien had been foreclosed and even though a treasurer's deed had issued to petitioner's immediate predecessor.

Petitioner appealed and a decision was rendered by the District Court of Appeal of the State of California on the second appeal, which decision is reported as *Wilson v. Beville*, at 175 A. C. A. 531.

Said District Court of Appeal of the State of California, affirmed the judgment of the trial court and the Supreme Court of the State of California refused to grant a hearing of petitioner's cause on January 20, 1960.

The said decision of the District Court of Appeal in 175 A. C. A. 531, effects a substantial change of the property law retroactively against the petitioner and denies the petitioner an equal application of existing laws, denies petitioner a jury trial, and deprives him of his property without due process of law.

Despite the fact that at all times and in all courts recited hereinabove, the petitioner cited and referred to Sections 6555 and 6571 of the Streets and Highways Code of the State of California, no court has yet seen fit to even comment as to why such sections were not given force and effect.

At all times during the above quoted lengthy litigation and throughout all proceedings, the petitioner wherever possible has cited and maintained that any act of the State Court which refused to give effect to petitioner's ownership of the property herein involved, and to compensate him therefor, violated the 14th Amendment to the United States Constitution.

The raising of the violation of the 14t Amendment to the United States Constitution by means of acts of the judiciary is suggested in the Petition for Rehearing in the District Court of Appeal of the State of California

and in the Petition for Hearing in the Supreme Court of the State of California, filed by the petitioner herein, specifically on page 9 of the Petition for Rehearing in the District Court of Appeal, and on page 22 of the Petition for Hearing in the Supreme Court.

ARGUMENT.

The District Court of Appeal of the State of California has decided an important question arising under the 14th Amendment to the Constitution of the United States involving vested property rights, in conflict with the applicable decision of the Supreme Court of the United States in the following cases:

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U. S. 226;

Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873;

Aaron v. Cooper, 358 U. S. 1, 78 S. Ct. 1401.

The District Court of Appeal of the State of California, through its action in affirming the judgment of the trial court after a reversal on appeal to determine the compensation to be paid petitioner, has deprived petitioner of his property without just compensation and without due process of law, in that the land owned by the petitioner and conveyed to petitioner by his predecessor was not at any time evaluated at its market value, nor was evidence taken concerning the market value, nor was evidence permitted within the scope of the trial resulting in the award to petitioner of his predecessor's lien.

The decision of the trial court on the amount of plaintiff's compensation was based on the value of a lien owned by plaintiff's predecessor in interest, even though

petitioner was never the owner of such lien and owned only the absolute title pursuant to issuance of a Treasurer's Deed to his predecessor and a deed from his predecessor to him.

It is urged that the failure of any California court of record to even mention Sections 6555 and 6571 of the Streets and Highways Code, let alone not to give force and effect to said statutes, constitutes not only a denial of equal protection of the laws and deprivation of petitioner's property without due process of law substantively, but also, in force and effect, denies petitioner a hearing, for all decisions herein of the Courts of the State of California have consistently refused to recognize the existence of said laws and have consistently turned a deaf ear to impassioned pleas on the part of petitioner for suggestions as to the reason for the failure to apply said laws to the facts in the within action. Certainly, the failure of California State Courts to enforce the lawful rights of a citizen thereof based on existing California statutes by *ignoring* the statutes, is parallel to the recent difficulties in connection with enforcement of racial integration in the schools in the southern part of the United States.

It is urged that the principle of equal application of the laws ought not to apply solely to racial integration, but should also apply to the failure in any instance of a State to give force and effect to the laws enacted, which failure to give force and effect to the laws results in a deprivation of property. The decision of the District Court of Appeal, reported in 175 Advance Cali-

fornia Appellate Reports, 531, stated, among other things, that on the prior appeal it was held that the assessment lien was not impaired by the condemnation action, and then concluded with a *non-sequitur*:

> "The trial court did not err in determining that the compensation due to plaintiff was the amount of the lien, $207.57, and interest thereon from April 13, 1951, when this action was commenced."

It is submitted that the foregoing completely ignores the fact that the "unimpaired lien" was foreclosed and a treasurer's deed issued to petitioner's predecessor in interest and that such treasurer's deed conveyed absolute title to the petitioner under the Streets and Highways Code, Section 6555.

Suppose a Southern State should enact a law which provided, in substance, as follows: "No teacher of any school supported by the Southern State X, shall fail to instruct any pupil or discriminate on tests against any pupil, or fail to give tests to any pupil because of his race or color," and despite that fact, a teacher made a practice of completely ignoring those of the Negro race who were members of the class and completely failed to give tests or reports of any kind on the aptitude or ability of the negro student and, the enforcement of such provision were sought in a court of law of Southern State X, and the courts of the Southern State X refused to acknowledge the existence of said law by comment in any way, would the principle be different than the one involved in the instant proceeding?

It is urged that it would not and that it is a manifest miscarriage of justice for the California courts to completely ignore existing California statutes vesting property rights in individuals and playing on words to accomplish an unjust result, the taking of petitioner's property without just compensation.

It is urged that the decision of the District Court of Appeal was not based on law or logic, but rather on emotion. Had the amount of the prior lien that had been foreclosed amounted to say $10,000.00, and the market value of the property taken been but $5,000.00, there is no doubt in petitioner's mind that the provisions of Sections 6555 and 6571 of the Streets and Highways Code would have been put in force and effect so that a determination of the market value of the land would have occurred.

In addition to the foregoing, the decision of the District Court of Appeal of the State of California has retroactively changed a rule of property law so as to deprive the petitioner herein of his property without due process of law, in that California law has always, prior to the second decision in *Wilson v. Beville,* 175 A. C. A. 531, followed the *quasi-in-rem* theory of Eminent Domain. (See, for example, *Wilson v. Beville,* 47 Cal. 2d 852; *Peckwith v. Lavezolla,* 50 Cal. App. 2d 211; *Lake Merced Water Co. v. Cowles,* 31 Cal. 315).

The decision of the District Court of Appeal (Appendix) applies the law of Missouri, an *in-rem* theory State, to a factual situation, which, applying a *quasi-in-rem* theory (California's prior law) accomplishes a different result.

In Missouri a condemnation action once commenced and prosecuted ordinarily eliminates any interest in land

a person might have and converts the interest in land to personal property, to wit, the condemnation award. (See: *St. Louis v. Beck*, 33 Mo. 1118, 63 S. W. 2d 814, 815.). So that the District of Appeal, in applying *Municipal Securities Corp. v. Kansas City*, 195 Mo. App. 464, to the factual situation in the within case, effectively changed the law of the State of California to that of an *in-rem* State, so far as condemnation is concerned. Although it is true that the said *Municipal Securities Corp. v. Kansas City* case, *supra*, was cited in *Wilson v. Beville*, 47 Cal. 2d 852, such case was cited for an illustration of the law in regard to priorities, but not in regard to the theory of condemnation actions.

Conclusion.

Your petitioner respectfully submits that the writ of certiorari should issue to the end that this Court may review the decision of the District Court of Appeal of the State of California, Second Appellate District, Division 1, and determine whether that Court has deprived petitioner of his property without due process of law, and further determine whether or not the State of California has failed to give petitioner equal protection of the laws.

Respectfully submitted,

ROBERT J. McGOWAN,

Attorney for Petitioner.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

H. J. Wilson, Plaintiff and Appellant, vs. Charles Henry Beville, *et al.*, Defendants, The City of Los Angeles, a municipal corporation, Defendant and Respondent. Civil No. 23734.

Filed November 23, 1959.

Appeal from a judgment of the Superior Court of Los Angeles County. Otto J. Emme, Judge. Affirmed.

John B. Anson and John J. Guerin, for Appellant.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, Ralph J. Eubank, Assistant City Attorney, Weldon L. Weber, Deputy City Attorney, for Respondent.

This is an action to quiet title to real property and for ejectment.

There was a prior appeal in this action. (Wilson v. Beville, 47 Cal. 2d 852 [306 P. 2d 789].) The present appeal is by plaintiff from the judgment (on the second trial) that plaintiff recover $207.57 and interest thereon.

Plaintiff's title to the property is based on a city treasurer's deed issued to his predecessor in interest pursuant to a foreclosure sale under a street improvement bond issued under the Improvement Act of 1911 (now Sts. & Hy. Code, secs. 5000-6794). The assessment resulting in the bond was in the amount of $207.57 and was recorded on November 23, 1927. On November 25, 1927, the city of Los Angeles commenced a condemnation action by which it sought an easement for street

purposes across part of the property. The owner of the assessment lien was not joined as a defendant in that action. On December 28, 1927, a bond representing the assessment was issued to the Municipal Bond Company. The holder of the bond was not made a defendant in the condemnation action. On July 23, 1931, final judgment of condemnation was entered in that action, and the record owner of the portion of the property condemned was awarded and paid $5,376.20. On January 22, 1932, the city took possession of the portion of the property condemned and has devoted it to public use as a city street since said date. Taxes have not been levied on that portion of the property since 1927.

On October 19, 1938, a treasurer's certificate of sale based on foreclosure of the bond was issued to Al Schuh. On March 8, 1950, Schuh assigned the certificate to Betty Wilson, and on August 23, 1950, a treasurer's deed was issued to her. On April 12, 1951, she executed a deed whereby she quitclaimed her interest in the property to plaintiff, and he commenced this action on the following day.

On the first trial, the judgment was that plaintiff was the owner of the property subject to an easement for a street, and that plaintiff take nothing by the action. On appeal by plaintiff from that judgment, the portion of the judgment that plaintiff was the owner of the property subject to the easement was affirmed, and the portion that plaintiff take nothing was reversed. (Wilson v. Beville, 47 Cal. 2d 852 [306 P. 2d 789].)

Prior to the second trial, a pre-trial conference order was made which stated that the only issue to be tried was the amount of compensation payable to plaintiff. Thereafter and prior to the second trial, the parties made

a written stipulation that the trial be limited to the proper construction of the decision on the prior appeal; and in the event a determination is made that (1) the plaintiff's damages are not a matter of arithmetical calculation, and (2) it is necessary to present evidence of the value of the property at a particular date, the trial shall be continued for at least a month and the issue as to the value of the property may be tried by a jury. After that stipulation was made, and prior to the trial date, the court made an order that "in the event of a determination of the legal issues which results in a conclusion that plaintiff's damages are not calculable by arithmetical determination, that the trial on the factual issues to determine the amount of damage to plaintiff shall be set for a jury trial. . . ."

The court found that, "construing the Opinion and Judgment" on the prior appeal, the "damages to be awarded plaintiff for the taking of a part of his interest in the property taken by defendant for public use as a street is a matter of arithmetical calculation, and by reason thereof" plaintiff should "have judgment in the amount of $207.57, the original assessment levied . . . with interest thereon at the rate of 7 per cent per annum from April 13, 1951." As conclusions of law, the trial court stated that the opinion on the prior appeal is construed, as follows: The damage payable to plaintiff is arithmetically calculable from the proper construction of the decision on the prior appeal. The date of taking plaintiff's interest in the property was January 22, 1932. The condemnation action, "setting forth the amount of damage to the property taken as $5,376.20," is not *res judicata* on the issue of plaintiff's damage herein.

The judgment was that plaintiff recover from defendant city the sum of $207.57 with interest thereon from April 13, 1951.

Appellant (plaintiff) contends that, under a proper construction of the decision on the prior appeal, the amount of his damage is not a matter of arithmetical calculation; but, on the contrary, he is entitled to have the amount of his damage determined by a jury. He asserts further that if, under a proper construction of that decision, the amount of his damage is a matter of arithmetical calculation, that amount is $5,336.20, which is the amount determined in the condemnation action to be the value of the property taken and damages to the remainder.

Respondent contends that the damages payable to appellant are calculable from the decision on the prior appeal, and that the trial court made a proper calculation. As above stated, the judgment of the trial court on the first trial was that plaintiff was the owner of the property subject to an easement for a street, and that plaintiff take nothing by the action. On appeal by plaintiff from that judgment, the portion of the judgment that plaintiff was the owner of the property subject to the easement was affirmed; but the portion of the judgment that defendant take nothing was reversed. The only issue at the second trial was the amount of compensation payable to plaintiff. As above shown, the parties stipulated that the second trial should be limited to the proper construction of the decision on the prior appeal, and to a determination as to whether the amount of plaintiff's damages was a matter of arithmetical calculation. The trial court determined that the amount of plaintiffs damage was a matter of arithmetical calculation, and that the amount was $207.57, which was the amount of the

original assessment, and that plaintiff was entitled to interest thereon from April 13, 1951; which was the date the action was commenced.

The court, on the prior appeal, said that the failure to join the lienholder in the 1927 condemnation proceeding left his lien unimpaired and, under the doctrine of inverse condemnation, plaintiff is entitled to compensation for the taking of his interest in the property. In the opinion on that appeal, condemnation cases were cited in which the holders of assessment or tax liens were not made defendants. In one of those cases, Municipal Securities Corp. v. Kansas City, 195 Mo. App. 464 [193 S. W. 880], it was said that "the city . . . is liable to the lienor in damages measured by the loss of the money which should have been applied in discharge of the lien." In another of those cases, Thibodo v. United States, 187 F. 2d 249, it was said: "When appellant has taken proper steps as just suggested [to amend his complaint to show that he has exhausted the state remedy or that state relief is not available, or that pursuit of state relief would be fruitless] he may then state his claim for relief based upon a deprivation of constitutional rights, by virtue of the 'taking' of his right to have his bonds discharged through foreclosure of the lien upon the land."

In the present case the notice of assessment was recorded two days before the condemnation action was commenced, and the city failed to name the lienholder a defendant in the action. If the lienholder had been so named, he would have been entitled to the amount of the lien, $207.57, and interest. When the city acquired the easement on part of the land in 1931, the lienholder's security for payment of the lien was diminished to the

extent that the easement decreased the value of the land which originally was security for payment of the lien. After 1927, taxes were not levied on the property which had been taken for the easement. When the lien was foreclosed it was a matter of public record that the easement was upon the property. About 20 years after the condemnation judgment in 1931, and about 13 years after the lien had been foreclosed, this present action was commenced wherein plaintiff sought an amount that was at least equal to the amount ($5,376.20) which had been paid to the owner of the property in 1932 after the property was condemned. As above stated, on the prior appeal it was held that the assessment lien was not impaired by the condemnation action. The trial court did not err in determining that the compensation due to plaintiff was the amount of the lien, $207.57, and interest thereon from April 13, 1951, when this action was commenced.

In view of the above conclusion, it is not necessary to determine other contentions on appeal.

The judgment is affirmed.

WOOD, *P. J.*

We concur:

FOURT, *J.*

LILLIE, *J.*

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IN THE

Supreme Court of the United States

October Term, 1959

No. 925

H. J. WILSON,

Petitioner,

vs.

CHARLES HENRY BEVILLE, *et al.*,

Defendants,

THE CITY OF LOS ANGELES, a municipal corporation,

Defendant and Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

H. J. Wilson has petitioned for a writ of certiorari directed to the District Court of Appeal of the State of California, Second Appellate District, Division One, to review the decision of that court in the above-entitled matter. It is respectfully submitted that, for the reasons hereinafter set forth, the petition should be denied.

Opinions Below.

The opinion in the decision which petitioner seeks to have reviewed is reported as *Wilson v. Beville,* 175 Advance California Reports (ACA) 531 [Hearing denied Jan. 20, 1960, 53 Adv. Cal. Rpts. No. 10, Minutes p. 2] and the opinion on the former Appeal in the case is reported as *Wilson v. Beville,* 47 Cal. 2d 852. Said decision in the former appeal [47 Cal. 2d 852], affirmed and reversed in part a prior opinion of the District Court of Appeal of the State of California, Second Appellate District, Division Two, which is reported as *Wilson v. Beville,* 290 P. 2d 70, 76. However, all decisions are in complete accord on the point involved herein, namely, the basis of any recovery petitioner is entitled to herein.

Jurisdiction.

Petitioner attempts to invoke the jurisdiction of this Court under section 1257(3) of Title 28 of the United States Code which provides for certiorari from a final judgment or decree of the highest state court where any title, right, privilege or immunity *is specially set up or claimed under the Constitution.* The complaint in this case was one to quiet title. Assuming there was no occasion to assert any right under the Constitution of the United States until the trial court on the second trial held that petitioner was entitled to compensation only in the amount of his lien on the property condemned, with interest from the date of commencement of his action, petitioner did not raise any federal question in his briefs filed on his Appeal from the second judgment nor in his oral argument to that Court.

He raised the federal question for the first time in his petition for rehearing filed in the District Court

of Appeal, which was denied, and subsequently in his petition for hearing in the California Supreme Court which was likewise denied.

1. Jurisdiction May Not Be Invoked by First Raising Federal Question in Petition for Rehearing.

In *Herndon v. Georgia*, 295 U. S. 441, 443, this Court said:

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Also see:

Radio Station W. O. W. v. Johnson, 326 U. S. 120, 128.

Nor did the California District Court of Appeal pass upon any federal question expressly or by implication, its decision being based upon a proper construction of a decision of the California Supreme Court on a prior appeal (*Wilson v. Beville*, 47 Cal. 2d 852), the application of certain California statutes to the facts of the case, and a determination of compensation due petitioner on account of an assessment lien in respect to certain property used as a public street since 1932. In view of these circumstances it is submitted that the judgment below rests completely upon State grounds. As stated in *Lynch v. New York, ex rel. Pierson*, 293 U. S. 52, 54:

> ". . . jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements wich are not part of the record.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . ."

And see;

Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635, 651.

Questions Presented.

The "Questions Presented" as set forth by petitioner on page 3 of his petition go far beyond the issues in the instant case. The question presented and determined in the instant case is simply whether a lienholder is intitled to an amount greater than his lien. As shown from the record filed herein and the decision of the District Court of Appeal, no questions of failure to compensate petitioner, ignoring state statutes, or denial of a jury trial are involved in this case as suggested by petitioner. Petitioner was compensated in the amount of his lien with interest; his only complaint is as to the insufficiency of the amount awarded.

In respect to denial of a jury trial, the record shows (as noted by the District Court of Appeal in its opinion) that the parties entered into a written stipulation which was prepared by counsel for petitioner and in which they agreed that the second trial should be limited to the legal issue of the proper construction of the decision on the prior appeal and as to whether the amount

of petitioner's damages was a matter of arithmetical calculation, and, in the alternative, that if not so calculable, then and only in that event was a jury trial to be had. (See Record herein, Stipulation and Order, dated March 14, 1958). The trial court determined that petitioner's damages was a matter of arithmetical calculation and that the amount was $207.57 with interest thereon from April 13, 1951, when this action was commenced.

No state statutes (Streets & Highways Code, Secs. 6555, 6571) were ignored as petitioner suggests and no question is presented on that point. As pointed out in the decision of the District Court of Appeal [*supra*] 175 A. C. A. 531, 532, 535:

> "On January 22, 1932, the City took possession of the portion of the property condemned and has devoted it to public use as a city street since that date. Taxes have not been levied on that portion of the property since 1927." * * *
>
> "When the lien was foreclosed it was a matter of public record that the easement was upon the property."

Therefore, since the lien was foreclosed on October 19, 1938, a treasurer's deed was not issued to petitioner's predecessor in interest until August 23, 1950, and petitioner obtained his interest in the property on April 12, 1951 by quit claim deed, it is clear that he has never had the property in any status other than subject to the City's street easement which was a matter of public record. The Supreme Court of California recognized this point when, in *Wilson v. Berille*, 47 Cal. 2d 852, 856, it stated ". . . the City has devoted the property to a public use since 1932. This fact pre-

cludes the plaintiff from gaining possession and thereby disrupting the public use—it vests the City with an easement." That being true, the state statutes referred to may not properly be construed as intending by the mere issuance of a treasurer's deed to enlarge petitioner's interest in the property and wipe out an old street easement which is of record. The California courts properly rejected petitioner's contention in this respect and did not ignore said state statutes as he alleges.

Statement of the Case.

The facts are as stated in the Opinion of the District Court of Appeal [*supra*], 175 A. C. A. 531. Petitioner's statement of the case is incomplete and does not give a true picture. Therefore, for the convenience of the Court, respondent will set forth below a brief summary of material facts:

Reduced to bare essentials the facts show that this is a case in which petitioner seeks to require the City to pay twice for a portion of a public street used as such since 1932. Petitioner claims title to the property involved by virtue of a City Treasurer's deed issued to his predecessor in interest after foreclosure sale of a street improvement bond issue pursuant to the Improvement Act of 1911 of the State of California (now Streets and Highways Code, Secs. 5000-6794). The assessment resulting in this bond was levied under the 1911 Act and recorded on November 23, 1927. It was in the amount of $207.57. Two days later, on November 25, 1927, the City commenced a condemnation action entitled City of Los Angeles v. House, being case No. 239,033, in the Superior Court of Los Angeles County, State of California, in which it took an easement for street purposes across only a part of the land upon which

said bond constituted a lien, but failed to name the then owner of that lien as a party defendant. About a month later, on December 28, 1927, the assessment not being paid, Bond No. 8, Series 2, was issued to the Municipal Bond Company in accordance with the procedures provided for by the state law. This is the source or origin of petitioner's present claim.

Thereafter, the following occurred (in chronological order):

1. July 23, 1931—A final judgment was entered in the condemnation action and the record owner of the property was paid $5,376.20.
2. January 22, 1932—The City took possession of the condemned property and devoted it to public use as part of a city street, grading, paving and improving it with curb and sidewalk, and has continued to this date to devote it to the same use.
3. October 19, 1938—The then holder of the street bond caused the lien thereof to be oreclosed by the City Treasurer, claiming as of said date the sum of $104.06, including penalties and interest, and Certificate of Sale No. 3108 in said amount was issued by the City Treasurer to one Al Schuh on the same date.
4. March 8, 1950—The said Al Schuh assigned said Certificate of Sale to one Betty Wilson.
5. August 23, 1950—A City Treasurer's deed was issued to said Betty Wilson.
6. April 12, 1951—Betty Wilson quitclaimed the subject property to H. J. Wilson, petitioner herein.
7. April 13, 1951—H. J. Wilson commenced the original action herein.

Neither petitioner, nor any of his predecessors in interest, nor anyone at all, has paid any taxes on the condemned portion of the subject property since June 23, 1927, nor has any taxing agency assessed or levied taxes thereon during that time.

Argument.

The law in California has long been clear that in order to obtain compensation for land taken for street purposes it must appear that the person claiming compensation was on the date of taking the owner of the property. (*Brick v. Cazaux* (1937), 9 Cal. 2d 549, 555). The California rule is in harmony with the rule announced in *United States v. Dow* (1958), 357 U. S. 17, at pages 20 and 21, that the owner at the time the government takes property, rather than the owner at a later or earlier date is entitled to compensation. Applying this fundamental rule of California law to the taking of property subject to liens, it is the settled rule that the legal owner is entitled to compensation for the property taken, *less the amount of the lien*. This is the holding in *Thibodo v. United States* (1951, C. C. A. 9th Cir.), 187 F. 2d 249 involving bonds issued under the California Improvement Act of 1911 [California Streets and Highways Code, Secs. 6400 *et seq.*], the same type of bond involved in the case at bar. It was there stated at pages 253 to 257:

> "* * * According to the California Supreme Court, the bond itself represents the lien upon the land after it has been issued * * *.
>
> "We hold that the lien here involved is a subject of public record, charging a subsequent condemnor with constructive notice thereof. Armed with this

knowledge, the amount of the lien could have been withheld for its rightful claimant. * * *

"Under the California law, a lienholder has a present proprietary interest in the subject matter of land sought to be taken by eminent domain proceedings which confers a right to have such interest considered and determined in said action. *City of Vallejo v. Superior Court,* 1926, 199 Cal. 408, 249 P. 1084, 48 A. L. R. 610; Calif. Code Civ. Proc. (1949) Secs. 1244, subd. 2, 1246, 1246.1, 1248. See *Harrington v. Superior Court,* 1924, 194 Cal. 185, 228 P. 15. Section 1248, subd. 8, of the California Code of Civil Procedure provides that if the amount of a lien is not due at the time of entry of the judgment, the amount may be deducted from the judgment, with the lien continuing until the indebtedness is paid. This section is held applicable to street improvement liens. *City of Los Angeles v. Superior Court,* 1934, 2 Cal. 2d 138, 39 P. 2d 401. If the lien is due and overdue, the security holder is entitled to have the money awarded in the condemnation proceedings applied to the payment of his claim. *City of Vallejo v. Superior Court, supra.* The very purpose of the statute is to prevent a situation wherein the condemnor will pay the full value of the land, and thereafter will be forced to pay again to holders of liens on the land. *City of Los Angeles v. Superior Court, supra.* * * *

"The California courts recognize the doctrine that when land is taken for public use, the money awarded for such land remains, and is to be considered as, representing the land in respect to all rights and interests relating thereto. The money is

applied to discharge the liens upon the land in accordance with the rights of encumbrances in respect to the land. *Los Angeles Trust & Savings Bank v. Bortenstein,* 1920, 47 Cal. App. 421, 190 P. 850. The lien claimant may follow the fund in order to subject it to his claim even if it has been paid out to others. *Rose v. Conlin,* 1921, 52 Cal. App. 225, 198 P. 653."

To the same point see:

Weber v. Wells (1946), 154 F. 2d 1004, 1005.

In view of these authorities it is clear that petitioner is in error in contending (Pet. pp. 12-13) that the District Court of Appeal, in following *Municipal Securities Corp. v. Kansas City,* 195 Mo. App. 464, 193 S. W. 880, "has retroactively changed a rule of property law so as to deprive the petitioner herein of his property without due process of law." The law of California has always been the same as that announced in the *Missouri* case, to wit: that under the facts of the instant case petitioner's damages are to be measured by the loss of the money which should have been applied in discharge of the lien. That amount ($207.57) has been awarded to petitioner. The Court, in the *Missouri* case (193 S. W. 880, 881), very aptly phrased the applicable rule as follows:

> "So when the city laid hold of that money without right—without authority from the lienor—and without notice of his lien, paid it out to the owner of the realty, it converted the money and is liable to the lienor *in damages measured by the loss of the money which should have been applied in discharge of the lien.*" (Emphasis ours).

It has also been the settled law in California since 1919 that the date of valuation in an inverse condemnation action is the date of taking (*Conlin v. Southern Pacific R.R. Co.*, 40 Cal. App. 743, 745; *Podesta v. Linden Irr. Dist.*, 141 Cal App 2d 38, 47) This is in harmony with the rule announced in *United States v. Dow, supra*, 357 U. S. 17, at page 22, that the date of taking is the date the United States enters into possession of the property and that it is that event which gives rise to a claim for compensation and fixes the date as of which the land is to be valued. In the instant case the record is clear that the date of taking and, therefore, of valuation was January 22, 1932 when the City took possession of the property and devoted it to a public use as part of a city street, grading, paving and improving it with curb and sidewalk.

In view of the foregoing authorities it is clear that petitioner is entitled only to the value of his *lien* on the date the City's street easement was acquired and *not* the value of said easement on the date the lien was acquired (as he contends) or on any other date. The record shows without conflict that the value of the lien on said date of taking did not exceed the sum of $207.57; that is all petitioner may claim in this action and that is precisely what the California courts have awarded him.

Conclusion.

It is respectfully submitted that for the reasons above set forth the petition for writ of certiorari should be denied.

Respectfully submitted,

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